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Re: Application for Renewal of License
WHYY-TV, Wilmington, DE
File No. BRET-20070329AGJ
Facility ID No. 72338

Counsel:

This is in response to an Informal Objection filed on behalf of the City of Wilmington (City) on December 14, 2009, against the above-referenced television license renewal application of WHYY Licensee, LLC (WHYY), licensee of WHYY-TV, Wilmington, Delaware. WHYY filed an opposition pleading, and City responded thereto.

In its informal objection, City generally asserts that the quality and content of WHYY's programming and news is inadequate and does not serve local needs and interests; that WHYY is in or will soon be in violation of the Commission's main studio rule; and that WHYY has not provided sufficient information in its application for a renewal of license. It maintains that for these reasons, the application should be denied or granted with the condition that WHYY broadcast local and state programming at least at current levels.¹ In response, WHYY states that its programming caters sufficiently to local needs and interests; that it continues to operate its studio in Wilmington in compliance with the Commission's main studio rule; and, that pursuant to Commission rules and policies, it supplied all required information in its renewal application.

¹ City states that if the Commission is unwilling to deny the renewal, it should issue a conditional renewal pursuant to Section 309(k)(2) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 309(k)(2) & (3).

Section 309(k)(1) of the Communications Act states that the Commission shall grant a license renewal application if it finds, with respect to that station, that: (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission rules or regulations which, taken together, would constitute a pattern of abuse.² If the licensee fails to meet this standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.³

Programming

City asserts, in its informal objection, that WHY Y has failed to serve the needs and interests of its community of license in its programming choices. In support, City points out that WHY Y replaced WHY Y’s daily, hour-long, local news program “Delaware Tonight” with a weekly, half-hour program “First.” City believes this reduction in programming hurts Wilmington, and, in its response to WHY Y’s opposition filing, cites Wilmington’s mayor, stating “Wilmington’s historic, artistic and cultural community suffers from a lack of coverage by the local media, and this lack of coverage has led to the incorrect perception that Wilmington’s historic, artistic and cultural community lacks the quality and depth of similar communities in, and around, Philadelphia.”

WHYY does not dispute that it has reduced its locally-produced programming, but states that the community also receives significant benefit from the national programming available on WHY Y-TV. WHY Y-TV broadcasts three different digital television channels, which WHY Y asserts address “all of the issues that have been identified as being of importance to the community.” According to William J. Marrazzo, president and CEO of WHY Y, WHY Y-TV provides more than 60 hours of children’s educational programming each week, as well as programming that addresses local issues, including pre-election forums and debates in Delaware. WHY Y also broadcast the first scheduled football game between the University of Delaware and Delaware State University and provided coverage of the Delaware State game against the University of Michigan in Michigan. Aside from its television offerings, WHY Y contends that the programming on its radio station and website satisfy any additional local news demands.

The Commission is prohibited by the First Amendment to the United States Constitution and Section 326 of the Communications Act of 1934, as amended, from censoring programs or from interfering with freedom of expression in broadcasting.⁴ The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee’s good faith discretion. Although every licensee has an obligation to present programming which is responsive to the problems, needs and interests of its service area, it is the responsibility of, and within the discretion of, each individual licensee to select the problems, needs and interests to be covered, as well as the particular programs to address those interests. Additionally, the Commission has specifically noted that programming not produced in or

² 47 U.S.C. § 309(k)(1).

³ 47 U.S.C. § 309(e).

⁴ 47 U.S.C. § 326; U.S. CONST., amend. I.

targeted at a local community may nonetheless serve the needs and interests of the community.⁵ Indeed, the issues selected by a licensee to be addressed may be determined by the interests and nature of its audience and the availability of other program services, including national programs. Because of this broad programming discretion allotted WHY Y, the shift from “Delaware Tonight” to “First,” a shorter, less frequent locally-targeted program, does not violate any Commission rule or policy.⁶ Therefore, absent a showing that there has been an abuse of discretion or a violation of our Rules, the Commission will not substitute its judgment for that of the licensee.

Main Studio

City alleges that WHY Y informed City that it has plans to close its main studio in Wilmington, Delaware, and to operate from a studio in Philadelphia, Pennsylvania. City states that closure of WHY Y’s Wilmington studio would not be in the interest of the community. City also claims that WHY Y is not currently in compliance with the Commission’s main studio rule. Richard Emge, a City of Wilmington attorney, states in a declaration that he scheduled an appointment to view the station’s public inspection file. Mr. Emge states that he made multiple phone calls to WHY Y and that all of his calls were transferred from WHY Y’s Wilmington office to its Philadelphia office. Further, upon his arrival at WHY Y’s Wilmington studio, he found no staff in the reception area and had to walk through the station’s newsroom in order to gain assistance. Finally, Mr. Emge states that, upon the conclusion of his visit, he was told to contact WHY Y’s Philadelphia office if he needed to conduct further review of the station’s public inspection file.

In response to City’s allegation, WHY Y asserts that its main studio is, in fact, in Wilmington, the community of license. WHY Y further states that it has not had and does not have plans to move its main studio out of Wilmington. WHY Y states, however, that it plans to move to a different Wilmington location with a more efficient studio.⁷ Further, WHY Y asserts that its Wilmington studio has at least eight full-time staff members. In response to Mr. Emge’s declaration, WHY Y acknowledges that phone calls to the Wilmington studio are transferred to the receptionist at WHY Y’s Philadelphia office. WHY Y’s president, Mr. Marrazzo, states that, although WHY Y does not have a receptionist at its Wilmington studio, visitors to the building must check in with security and can only gain further entry after security has called the office to which a visitor is going. Mr. Marrazzo concludes that Mr. Emge received assistance from WHY Y staff and was able to locate and copy public file documents.

The Commission’s main studio rule requires that each broadcast station operate a main studio within either the principal community contour of any station, of any service, licensed to its community of license or within 25 miles of the reference coordinates of the center of its community of license, whichever it chooses.⁸ We conclude that City has not provided sufficient facts that show WHY Y to be in

⁵ *In re KGAN Licensee, LLC*, 25 FCC Rcd 2549, 2557 (2010).

⁶ However, the duty of a television licensee to provide programming responsive to its community of license is not diminished by a licensee’s use of other types of media. Therefore, we do not consider WHY Y’s assertion that Wilmington’s local news needs are met through other avenues, such as WHY Y’s website or radio station.

⁷ It should be noted that prior Commission authorization to relocate a station’s main studio from one location to another within the community of license is not required. Subsequent to the relocation, the licensee should notify the Commission of their move. 47 C.F.R. § 73.1125(d)(1).

⁸ 47 C.F.R. § 73.1125(a).

violation of the Commission's main studio rule. WHY Y avers that its plans to move the studio consist of relocating the studio to another building in Wilmington, and City has not alleged specific facts which would contradict WHY Y. Further, according to the licensee, the Wilmington studio where Mr. Emge reviewed the public inspection file currently has a staff of eight. In addition, WHY Y maintains a local Wilmington phone number, in compliance with the main studio rule; forwarding calls to its Philadelphia office does not constitute a violation of this rule. Further, Mr. Emge's declaration confirms that he did review WHY Y's public inspection file. Mr. Emge does not allege that he was denied any materials. While Mr. Emge experienced inconvenience in making multiple phone calls to the station, that is insufficient to demonstrate that WHY Y is in violation of the rule. In fact, Mr. Emge need not have telephoned the studio at all, because, under Commission rules, no appointment is necessary to visit a station and view a public file during normal business hours.

Insufficiency of Information in Renewal Application

City asserts that WHY Y's renewal application (FCC Form 303-S) is incomplete because "Exhibits 1-28 appear to be missing." The absence of the exhibits is cited as a breach of WHY Y's duty to report "substantial and significant changes in information furnished by applicants to the Commission."⁹ City further asserts that Exhibit 29, which details WHY Y's compliance with the Commission's radio frequency (RF) exposure requirements, is too brief compared to that of WHY Y in its 1998 renewal application and requires the Commission to accept "on faith" WHY Y's response.¹⁰

WHY Y does not deny that Exhibits 1 through 28 are not present. With respect to Exhibit 29 concerning RF exposure limits, WHY Y explains that the difference between the 1998 renewal application and the current renewal application stems from the difference in scope of the RF exposure studies. Namely, the 1998 renewal application was based upon a study done on behalf of all Philadelphia DMA stations undergoing renewal that year. That study included all of the stations on all of the towers.¹¹ According to WHY Y, the current renewal application is based upon a 2006 study conducted solely on the behalf of WHY Y, and therefore limited to the tower used by WHY Y-TV.

Renewal applications are filed electronically with the Commission and utilize a certification process.¹² The online application forms pose a series of "yes" or "no" questions to the applicant centered on the applicant's compliance "with precedent, processing standards, Commission rules and policies, and the Act."¹³ If the applicant answers a question on the form in a way that requires further explanation, the applicant must submit an exhibit.¹⁴ However, a review of WHY Y's renewal application shows that

⁹ 47 C.F.R. § 1.65.

¹⁰ City also asserts that WHY Y failed in its renewal application to advise the Commission of its plans to close its main studio in Wilmington. We have already addressed and denied City's allegation regarding WHY Y's main studio.

¹¹ *WHY Y Opposition to Informal Objection* at 5.

¹² *In the Matter of 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998) ("Streamlining Order").

¹³ *Id.*

¹⁴ *Streamlining Order*, 13 FCC Rcd at 23067.

WHYY was not required to submit Exhibits 1 through 28 based on WHYY's answers to the exhibits' corresponding questions.¹⁵ Further, WHYY was not required to submit an exhibit explaining its compliance with the Commission's RF exposure requirements because WHYY certified that its facility complies with the maximum permissible radio frequency exposure limits.¹⁶ Accordingly, the information submitted by City fails to support its allegation that WHYY's renewal application is incomplete.

Accordingly, having failed to show that grant of the application would be *prima facie* inconsistent with the public interest or to raise a substantial and material question of fact, City's informal objection against WHYY's application for renewal is DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁵ File No. BRET-20070329AGJ, *available at* http://licensing.Commission.gov/prod/cdbb/pubacc/prod/cdbb_pa.htm (choose "Search for Application Information" and enter "WHYY-TV" into the "Call Sign" search field).

¹⁶ *Id.* at Sec. IV, Question 15.